

**MOTION FILED**

**AUG - 3 1984**

(6)  
**No. 84-9**

# **In The Supreme Court**

**OF THE**

**United States**

**OCTOBER TERM, 1983**

**MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,  
and CECILIA STEVENSON,  
*Petitioners,***

**v.**

**DORIS RUSSELL,  
*Respondent.***

**MOTION FOR LEAVE TO FILE  
BRIEF OF AMICI CURIAE  
AND**

**BRIEF OF AMICI CURIAE PIPE TRUST,  
IBEW-NECA TRUST, AIRCONDITIONING TRUST  
AND FLOOR COVERING TRUST IN SUPPORT  
OF PETITION FOR WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT**

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**August 3, 1984**

**Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600.**

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260 p.p.

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DORIS RUSSELL,  
*Respondent.*

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**MOTION FOR LEAVE TO FILE  
BRIEF OF AMICI CURIAE**

---

COMES NOW The Southern California Pipe Trades Trust Funds ("Pipe Trust"), the Southern California IBEW-NECA Trust Funds ("IBEW-NECA Trust"), the Airconditioning and Refrigeration Industry Trust Funds ("Airconditioning Trust"), and the Southern California Floor Covering Trust Funds ("Floor Covering Trust"), hereinafter sometimes referred to collectively as the "Trust Funds" and, pursuant to Rule 36.1 of the Rules of this Court, hereby respectfully request that this Court grant leave to file the accompanying Brief of Amici Curiae Pipe Trust, IBEW-NECA Trust, Airconditioning Trust and Floor Covering Trust in support of Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. The Petitioners, Massachusetts Mutual Life Insurance Company and Cecilia Stevenson, have consented to the filing of this Brief, whereas Respondent Doris Russell

has declined to grant permission. The basis for this Motion is as follows:

1. Amici Curiae Trust Funds are so-called "Taft Hartley" Trust Funds, meaning they were created pursuant to collective bargaining between management and labor, and operate under Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5). In addition, The Amici Curiae Trust Funds are multiemployer trust funds with numerous employer contributors and covering a broad geographical area. As more fully described in the accompanying Brief, the individual Trustees of these Trust Funds are representatives of either labor or management, as required by Section 302(c)(5). *NLRB vs. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

2. In addition to being regulated by Section 302(c)(5), each of the Trust Funds is also an "employee benefit plan" within the meaning of Section 3(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(3), and is, therefore, regulated by ERISA. Each Trustee of the Amici Curiae Trust Funds, and there are presently 40 such trustees, is a fiduciary within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).

3. As more fully described in the Petition for Writ of Certiorari, the Court of Appeals held that, under ERISA, a fiduciary is personally liable for punitive damages and extra-contractual compensatory relief in actions brought by plan participants arising out of claims for benefits. These Amici Curiae are vitally interested in the outcome of this matter, since their respective trustees are ultimately responsible for the processing of hundred of thousands of claims for benefits annually. As fiduciaries, these trustees are therefore exposed to a multitude of situations giving rise to personal liability in the event of error. This repeated exposure exists under the ruling of the Court of Appeals,

notwithstanding the fact that these trustees serve without compensation and on a volunteer basis.

4. The plan of benefits involved in the instant case is *not* a multiemployer plan regulated by Section 302(c)(5). Even though the decision of the Court of Appeals applies with equal force to individual fiduciaries serving as trustees on a multiemployer Section 302(c)(5) Trust Fund, there is no mention of Section 302(c)(5) in the decision and no indication that the Court of Appeals took into account the unique posture of a Section 302(c)(5) Trust Fund. Unless these Amici Curiae are permitted to be heard, there is a serious prospect that insufficient account will be taken of the unique circumstances of a multiemployer Section 302(c)(5) Trust Fund, and that inadequate consideration will be given to the interplay between Section 302(c)(5) and ERISA.

5. This Court has recently made note of the "express congressional policy favoring multiemployer trusts" and chastised a Court of Appeals for failing to take into account that Congressional policy. *Id.* at 338, n. 22. As argued more fully in the annexed Brief of Amici Curiae, there is a substantial chance that the Court of Appeals' decision will radically alter the character of such trusts, if not eliminate them altogether. There are 1,924 multiemployer trusts with 100 or more participants nationwide, which cover 8,337,000 participants. Comptroller General of the United States, Report to the Congress, GAO/HRD-84-1, at 8 (1984). The Amici Curiae Trust Funds submit that no decision impacting on such a broad class should be rendered without the opportunity for an appropriate representative of that class to be heard.

Accordingly, these Amici Curiae Trust Funds respectfully request that leave be granted as requested and the accompanying Brief of Amici Curiae filed and considered by the Court.

Respectfully submitted,

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## INTEREST OF AMICI CURIAE

It is, undoubtedly, common practice for litigants to sound alarums before this Court in hope of persuading the Court that their cause, among all other causes, is worthy of the Court's attention. We refuse to dissemble this Court by urging that lives may hang in the balance upon the instant cause, or that it rises to the level of eliciting some grave constitutional pronouncement. At the same time, and at the risk of being classed with those who would cry wolf, this Court should not remain unsuspecting about the grave consequences which will surely attend the ruling of the Court of Appeals: An enterprise carefully nurtured since



its infancy with Congressional succor, and just now achieving its maturity, will cease to be in any form remotely approaching its historical persona. The *Amici Curiae* have been and hope to remain a part of that enterprise.

This Brief is being filed jointly on behalf of four Trust Funds: The Southern California Pipe Trades Trust Funds ("Pipe Trust"), The Southern California IBEW-NECA Trust Funds ("IBEW-NECA Trust"), The Airconditioning and Refrigeration Industry Trust Funds ("Airconditioning Trust"), and The Southern California Floor Covering Trust Funds ("Floor Covering Trust"). Each of these Trust Funds is situated in California and was created as a result of collective bargaining on a multiemployer basis between labor and management. Thus, for example, the Pipe Trust was created in about 1957 as a result of collective bargaining between the Southern California Pipe Trades District Council No. 16 of the United Association for and on behalf of its affiliated local unions and the predecessor multiemployer association to the Plumbing & Piping Industry Council. The IBEW-NECA Trust, as another example, was created in about 1964 as a result of collective bargaining between Local Union No. 11 International Brotherhood of Electrical Workers, AFL-CIO, and the Los Angeles County Chapter of National Electrical Contractors Association. Each of these Trust Funds, under separate trust indentures, provides both health and welfare benefits and pension benefits to tens of thousands of eligible participants. Each of these Trust Funds is a so-called "Taft-Hartley" trust fund, meaning that each was created under the aegis of Section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. Section 186(c)(5). Section 302(c)(5), among other things, requires, and has always required, that "employees and employers [be] equally represented in the administration" of Taft-Hartley pension and health and welfare funds. *NLRB v. Amax Coal Co.*, 453

U.S. 322, 329 (1981). Pursuant to this statutory mandate, the labor organizations and employers who created the instant Trusts have historically appointed their respective representatives to serve as trustees on these Trusts.

There are, and have been, 14 such Trustee representatives on the Pipe Trust, 14 on the IBEW-NECA Trust (pension), 6 on the Airconditioning Trust, and 6 on the Floor Covering Trust. These Trustee representatives are not professionals, in the sense of receiving compensation for serving in the capacity of Trustee or even in the sense of devoting a full-time effort to the position of Trustee. On the contrary, almost all Trustees are employed full-time elsewhere, either by a participating labor organization or by a contributing employer. Accordingly, their service to the respective Trust Funds as Trustee is on a volunteer basis and arises out of their personal commitment to better the industry. The position of Trustee, is, by its nature, a part-time position, carried out in addition to duties and responsibilities elsewhere. While the position is part-time, the Trustees nonetheless carve out of their working life an enormous amount of time and energy to devote to this volunteer effort. Thus, each Trustee devotes in excess of 40 hours per month to the affairs of the Trust Funds, preparing for and attending meetings of the Trustees as a whole, as well as various committee meetings such as administrative, delinquency, appeals, investment (or finance), and building committees.

Under the direction of the Trustees, the Trust Funds annually handle hundreds of thousands of claims for benefits by participants and their dependents. During the 1983 calendar year, the Pipe Trust received 259,328 health and welfare claims and 339 pension applications; the Airconditioning Trust received 45,844 health and welfare claims and 35 pension applications; and the Floor Covering Trust received 8,751 health and welfare claims and 45 pension appli-



cations. During the 1983-4 fiscal year, the IBEW-NECA Trust received 141,909 health and welfare claims and 304 pension applications. Therefore, during a 12-month period, these four Trust Funds alone processed a total of 455,832 health and welfare claims and received 723 pension applications. Not all of these applicants and claimants, of course, are happy with the manner in which their claim or application is processed. There can be no doubt that the promise of punitive damages and extra-contractual compensatory relief held out by the Court below will inspire or induce a greater proportion of these unhappy claimants to seek judicial relief, most likely in federal court. If only one-tenth of one percent of these claims give rise to litigation, the courts will be flooded with over 450 suits per year with respect to these four Trust Funds alone. Moreover, the personal assets of volunteer trustees will be exposed many times over. This is not by any means an idle fear: Following on the heels of the publication of the Court of Appeals opinion, the Pipe Trust was served with a summons and complaint in a case encaptioned *Louis Moot v. Retirement Fund Trust, etc., et al.*, CIV No. 84 3411 HLH (C.D. Cal.) in which 13 of the Pipe Trust's Trustees are named as individual defendants. The plaintiff, who alleges that he was improperly denied certain benefits, seeks damages for "physical and mental pain and suffering" in the sum of \$125,000 and punitive damages "in a sum equal to 25% of the net worth of each defendant." The Amici Curiae, therefore, have a plain and immediate interest in the outcome of the instant Petition.

### SUMMARY OF ARGUMENT

The Court of Appeals, in *Russell v. Massachusetts Mutual Life Insurance Company*, 722 F.2d 482 (9th Cir. 1983), held that individual fiduciaries are personally liable to plan participants for punitive and extra-contractual compensatory damages under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001 et

seq., in cases arising out of the untimely handling of benefit claims. The Court of Appeals found the timeliness requirement in the provisions of Section 503 of ERISA, 29 U.S.C. Section 1133, and, in particular, in the regulation promulgated by the Secretary of Labor at 29 CFR Section 2560.503-1(h). This regulation, as the Court of Appeals notes, requires that benefit decisions be made "promptly," but in any event no later than 120 days from the "receipt of a request for review." *Id.* at 489. Failure to meet this time deadline, so the Court held, is a breach of fiduciary duty and exposes individual fiduciaries to the spectre of potentially enormous personal liability. The Court reached this conclusion notwithstanding the fact that the very same regulations issued by the Secretary of Labor provide that if a benefit decision is not rendered within the time required, "the claim shall be deemed denied." 29 CFR § 2560.503-1(h)(4). This is the only remedy the Secretary of Labor contemplated for untimely action upon a benefit claim, and was undoubtedly drafted so as to permit participants to avoid a contention that they failed to exhaust their administrative remedies in the event they bring suit after the passage of 120 days. *Amato v. Bernard*, 618 F.2d 559 (9th Cir. 1980); *Scheider v. United States Steel Corp.*, 486 F.Supp. 211 (W.D. Pa 1980).

Amici Curiae contend that in reaching its decision, the Court of Appeals failed to take into account the requirements of Section 302(c)(5) of the Labor-Management Relations Act and the expressed Congressional policy favoring multiemployers trusts. Moreover, by implying new remedies into a comprehensive statutory scheme, the Court of Appeals ignored the disparate impact its ruling would have among the several states, despite the clear Congressional purpose of achieving uniformity in the regulation of Taft-Hartley Trust Funds and contrary to prior rulings of this Court in analogous circumstances.

## ARGUMENT

### I

#### THE COURT OF APPEALS' HOLDING IS INCONSISTENT WITH THE FEDERAL REGULATORY SCHEME GOVERNING MULTIEMPLOYER, TAFT-HARTLEY TRUST FUNDS.

As stated in the accompanying Motion, there is no mention of Section 302(c)(5) of the Labor-Management Relations Act in the opinion of the Court of Appeals. Similarly, there is no mention of multiemployer trust funds. Yet, it is clear that the ruling of the Court of Appeals applies to fiduciary — trustees of multiemployer Taft Hartley funds, such as these *Amici Curiae*.

The failure to consider the relationship of Section 302(c)(5) to ERISA leads to some anomalous results: For example, the Court of Appeals noted that "ERISA was intended to serve as a substitute for various existing state protective laws and regulations . . . It would be anomalous if Congress eliminated the protections offered by state law without providing comparable federal protections." *Russell v. Massachusetts Mutual*, 722 F.2d at 488.

However, it is clear that multiemployer Taft-Hartley trust funds were regulated by federal law, to the exclusion of state law, long prior to the passage of ERISA. Moreover, this regulation by federal laws other than ERISA has not been supplanted by ERISA. On the contrary, it continues to date and must, therefore, must be reconciled with ERISA.

Some thirteen years ago, this Court observed that under Section 301 of the Labor-Management Relations Act, 29 U.S.C. Section 185, retirees have a cause of action in the context of a Taft-Hartley Trust Fund for breach of the obligation to pay pension benefits. *Chemical Workers Local 1 v. Pittsburg Plate Glass Co.*, 404 U.S. 157, at 176-77n.

17. Yet, the Ninth Circuit has itself held that punitive damages are not available under Section 301. *Williams v. Pacific Marine Association*, 421 F.2d 1287 (9th Cir. 1970). In addition, this Court and the Ninth Circuit have both stated that ERISA does not supplant Section 302(c)(5). *UMW Health & Retirement Funds v. Robinson*, 455 U.S. 562, 575 (1982); *Hurn v. Retirement Fund Trust*, 803 F.2d 386, 391 (9th Cir. 1983). As the Court in *Hurn* put it, "ERISA was not to affect any federal laws not specifically mentioned." *Id.* In a pre-ERISA suit seeking benefits from a Taft-Hartley trust fund the Ninth Circuit has held that state laws pertaining to commercial insurance contracts are "not consistent with the federal policy of treating parties to collective bargaining contracts as parties of equal strength." *Rehmar v. Smith*, 555 F.2d 1362, 1369 (9th Cir. 1976). Lastly, as this Court has opined, and as noted in the accompanying Motion, Congress has an express policy of favoring multiemployer trusts. *NLRB v. Amax Coal Co.*, 453 U.S. at 338 n. 22.

In view of this on-going federal regulation of multiemployer trust funds, and the solicitous attitude of Congress towards these funds, it is peculiar that the Court of Appeals should adopt a rule at this late date which may ultimately lead to the demise of such funds. The imposition of punitive damages upon individual trustees of these funds is, it is submitted, plainly at odds with Section 301 and Section 302(c)(2) and the decisions of this Court thereunder. This conflict created by the decision of the Court of Appeals is exacerbated by the Court's discussion of the duties imposed by ERISA regarding the processing of benefit claims. The Court notes that these duties are in part identical to standards imposed upon labor organizations under *Vaca v. Sipes*, 386 U.S. 171 (1967) and its progeny. Yet this court has unequivocally held that punitive damages are unavailable in breach of fair representation cases. *Electrical*



*Workers v. Foust*, 442 U.S. 60 (1979). It is difficult to imagine that Congress intended individual fiduciaries to process claims with the same or similar standard of care obtaining in fair representation cases, and at the same time intended that disgruntled benefit claimants could secure punitive relief against individual Taft-Hartley trustees. Therefore, these Amici Curiae urge the court to accept certiorari in order to reconcile this conflict created by the Court of Appeals.

## II

### **EXPOSING INDIVIDUAL FIDUCIARIES TO PUNITIVE DAMAGES IN BENEFIT CLAIMS CASES WILL JEOPARDIZE THE ENTIRE FIELD OF TRUST FUNDS, SINCE SUCH DAMAGES ARE UNINSURABLE IN MANY JURISDICTIONS.**

Notwithstanding an express statutory provision governing suits by participants arising out of claims for benefits [ERISA Section 502(a)(1)(B), 29 U.S.C. Section 1132(a)(1)(B)], the Court of Appeals held that a participant may also characterize a denial of a claim for benefits as a breach of fiduciary duty. As such, so the Court of Appeals held, the participant may sue under ERISA Section 502(a)(2), 29 U.S.C. Section 1132(a)(2) and obtain for his or her own account the "remedial relief" against fiduciaries referred to in ERISA Section 409, 29 U.S.C. Section 1109. The Court of Appeals further concluded that this "remedial relief" encompassed both compensatory damages (such as damages for mental and emotional distress) and punitive damages.

In finding that the "remedial relief" available to benefit claimants encompassed compensatory damages, the Court of Appeals noted that such damages were recoverable against the fiduciary personally, and not as against the benefit plan itself. *Russell v. Massachusetts Mutual*, 722 F.2d at 490, n. 8. Of course, in this case, the only fiduciary sued was

Massachusetts Mutual Life Insurance Company, as distinguished from the individual members of the company's disability committee. Accordingly, the only "personal" liability which might attach in the instant case will be borne by an entity, as distinguished from any individual. Nevertheless, the Court of Appeals' rationale applies equally to individuals, such as the Trustees of These Trust funds, where they occupy fiduciary positions and are named defendants. Apparently, in the belief that it was softening the blow behind its holding, the Court of Appeals observed that "ERISA does allow for certain forms of fiduciary indemnification under Section 1110." *Id.*

Section 410 of ERISA, 29 U.S.C. Section 1110, however, does *not* in fact provide for "fiduciary indemnification" in the traditional sense of the phrase. On the contrary, ERISA made unlawful exculpatory clauses historically employed in trust indentures, designed to insulate trustees from personal liability. Thus, Section 410 expressly provides, in relevant part, that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part [Part 4 of ERISA, entitled "Fiduciary Responsibility"] shall be void as against public policy." Section 410 does go on to provide that a plan may purchase insurance for itself or for its fiduciaries, *so long as* such insurance "permits recourse by the insurer against the fiduciary in case of a breach of a fiduciary obligation by such fiduciary." In addition, under Section 410, fiduciaries are permitted to buy their own insurance, or employers or unions are permitted to buy insurance for the fiduciary. In short, pursuant to Section 410, a fiduciary is permitted to obtain liability insurance, so long as someone other than the plan pays the premium. Insurance *may* be available to protect an individual trustee against claims by participants for compensatory damages. However, it will be noted that the Court of Appeals did not drop any such palliative footnote



when it concluded that individual fiduciaries were also exposed to punitive damages in benefit claims cases. This is so because, at least in the State of California where the instant case arose, an insurance carrier is barred by both statutory and decisional law from providing insurance against punitive damages.

Thus, California Civil Code § 1668 provides as follows:

“§ 1668. *Contracts contrary to policy of law.*

CERTAIN CONTRACTS UNLAWFUL. All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or wilful injury to the person or property of another, or violation of law, whether wilful or negligent, are against the policy of law.”

§ 533 of the California Insurance Code similarly provides as follows:

§ 533. *Wilful act of insured; negligence.*

An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured, or the insured's agent or others.”

The California courts have concluded that these two code sections prevent an individual from insuring against punitive damages. *City Products Corp. v. Globe Indemnity Co.*, 88 Cal.App.3d 31 (1979); *Ford Motor Co. v. Home Insurance Co.*, 116 Cal.App.3d 374 (1981); *Peterson v. Superior Court*, 31 Cal.App.3d 147 (1982). Moreover, even if a policy of insurance by its terms expressly includes coverage for punitive damages, an insurance carrier is still not liable to indemnify an insured against a judgment for punitive damages. Thus, in the *City Products* case, for example, the policy in dispute covered “all sums the insured shall become legally obligated to pay as damages.” [Emphasis supplied]

*Id.* at 33. Notwithstanding the breadth of coverage contained in the contract of insurance, the court in *City Products* reasoned as follows:

“The policy considerations in a state where . . . punitive damages are awarded for punishment and deterrence, would seem to require that the damages rest ultimately as well as nominally on the party actually responsible for the wrong. If that person were permitted to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, as compensatory damages already have made the plaintiff whole.”

*City Products*, 88 Cal.App.3d 31, 39, quoting *Northwestern National Casualty Co.*, 307 F.2d 432 (5th Cir. 1962).

Accordingly, in California, punitive damages imposed under the standard enunciated by the Court of Appeals will rest ultimately as well as nominally on the individual Taft-Hartley trustees who have volunteered their time for the betterment of the industry. The *in terrorem* effect of being exposed to such personal financial jeopardy, in the face of ultimate responsibility for processing hundreds of thousands of claims, will deter all but the most doughty — or the most foolhardy — from serving a trusteeship.

### III.

#### **A COURT SHOULD NOT IMPLY A CONGRESSIONAL INTENT TO PERMIT THE RECOVERY OF PUNITIVE DAMAGES, WHERE SUCH RELIEF WILL IMPACT DISPARATELY AMONG THE SEVERAL STATES.**

While California will leave Taft-Hartley trustees personally exposed to punitive damages, in other jurisdictions individual fiduciaries will not function under such a spectre. Thus, at least 14 states have concluded that an individual

may insure against punitive damages: (1) Arizona, *Price v. Hartford Accident & Indemnity Co.*, 108 Ariz. 485, 502 P.2d 522 (1972); (2) Arkansas, *California Union Ins. Co. v. Arkansas Louisiana Gas Co.*, 264 Ark. 449, 572 S.W.2d 393 (1978); (3) Georgia, *Greenwood Cemetery, Inc. v. Travelers Indem. Co.*, 238 Ga. 313, 232 S.E.2d 910 (1977); (4) Idaho, *Abbie Uriquen Oldsmobile Buick, Inc. v. United States Fire Ins. Co.*, 95 Idaho 501, 511 P.2d 783 (1973); (5) Iowa, *Cedar Rapids v. Northwestern Nat. Ins. Co.*, 304 N.W.2d 228 (1981); (6) Kentucky, *Continental Ins. Co. v. Hancock*, 507 S.W.2d 146 (1973); (7) Louisiana, *Fagot v. Ciravola*, 445 F.Supp. 342 (ED La 1978); (8) Maryland, *First National Bank v. Fidelity & Deposit Co.*, 283 Md. 228, 389 A.2d 359 (1978); (9) Mississippi, *Anthony v. Frith*, 394 S.2d 867 (1981); (10) Oregon, *Harrell v. Travelers Indemn. Co.*, 279 Or. 199, 567 P.2d 1013 (1977); (11) Tennessee, *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 383 S.W.2d 1 (1964); (12) Texas, *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978); (13) Vermont, *State v. Glens Falls Ins. Co.*, 137 Vt. 313, 404 A.2d 101 (1979); (14) West Virginia, *Hensley v. Erie Ins. Co.*, 283 S.E.2d 227 (1981).

On the other hand, and in addition to California, at least 12 states have concluded that liability insurance coverage for an award of punitive damages is void as against public policy: (1) Colorado, *Universal Indem. Ins. Co. v. Tenery*, 96 Colo. 10, 39 P.2d 776 (1934); (2) Connecticut, *American Ins. Co. v. Saulnier*, 242 F.Supp. 257 (D.C. Conn. 1965); (3) Florida, *Dorsey v. Honda Motor Co.*, 655 F.2d 650 (5th Cir. 1981); (4) Illinois, *Beaver v. Country Mutual Ins. Co.*, 95 Ill.App.3d 1122, 420 N.E.2d 1058 (1981); (5) Indiana, *Grant v. North River Ins. Co.*, 453 F.Supp. 1361 (N.D. Ind. 1978); (6) Kansas, *American Surety Co. v. Gold*, 375 F.2d 523 (10th Cir. 1966); (7) Minnesota, *Wojciak v. Northern Package Corp.*, 310 N.W.2d 675 (1981); (8) Missouri, *Crull*

*v. Gleb*, 382 S.W.2d 17 (1964); (9) New Jersey, *Variety Farms, Inc. v. New Jersey Mfrs. Ins. Co.*, 172 N.J.Super 10, 410 A.2d 696 (1980); (10) New York, *Parker v. Agricultural Ins. Co.*, 109 Misc.2d 678, 440 N.Y.S.2d 964 (1981); (11) Pennsylvania, *Esmond v. Liscio*, 209 Pa. Super. 200, 224 A.2d 793 (1966); (12) Virginia, *Northwestern Nat. Casualty Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962).

Based on the foregoing, it is clear that the rule adopted by the Court of Appeals, were it to be embraced by other Circuits (which it has not), would fall unevenly upon individual fiduciaries, depending on the fortuity of which state law governed the terms of any contract of insurance. The Court of Appeals ruling will even have a disparate impact within the Ninth Circuit, for it will be noted from the foregoing that the states of Arizona, Idaho and Oregon each permit insurance against punitive damages, whereas California does not.

It may be urged that the argument herein cuts too far, for if adopted it would preclude Congress from ever enacting a statute calling for punitive relief because of the disparate impact such a statute may have among the several states. However, such a broad proposition is not advocated herein. Rather, because of the disparate impact among the several states, it should not lightly be presumed that Congress intended punitive relief be available, particularly where, as in the instant case, there is scanty evidence of any such Congressional intention.

#### IV

#### THE JUDICIARY SHOULD NOT FASHION NEW REMEDIES IN THE FACE OF A COMPREHENSIVE LEGISLATIVE SCHEME

As set forth in the Petition for Certiorari (at p. 13), ERISA describes a comprehensive and elaborate scheme for enforcement, which nowhere mentions punitive damages.

In an analogous context, this Court recently had occasion to pass upon the propriety of implying an additional remedy into a comprehensive legislative scheme. *Northwest Airlines v. Transport Workers Union*, 451 U.S. 77 (1981); see also, *Texas Industries v. Radcliffe*, 451 U.S. 630 (1981). In *Northwest Airlines*, the issue was whether the Equal Pay Act or Title VII of the 1964 Civil Rights Act would permit a defendant to seek indemnification or contribution from a third party. In holding that these statutes would not permit such a remedy, this Court opined as follows:

"The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement. Both the Equal Pay Act and Title VII of the Civil Rights Act of 1964 are such statutes. The judiciary may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs."

*Id.*, 451 U.S. at 97.

It is hard to imagine a more comprehensive legislative scheme than ERISA. When the requirements of § 302(c)(5) are added to those of ERISA, it becomes even clearer that judicially crafted remedies are unwarranted.

## CONCLUSION

Based on the foregoing, together with the arguments advanced in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals.

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August 3, 1984